David B. Cohen
Mayor

CITY OF NEWTON, MASSACHUSETTS

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Board of Aldermen Action Date:	April 7, 2008
90-Day Expiration Date:	April 27, 2008

TO: Ald. Brian E. Yates, Chairman, and
Members of the Zoning and Planning Committee
Planning and Development Board

FROM: Michael Kruse, Director of Planning and Development
Juris Alksnitis, Chief Zoning Code Official

SUBJECT: Petition #111-07, ZONING TASK FORCE recommending amendments to 30-21(3)(c), referred to as the de minimis rule, by amending the existing language with provisions: (1) clarifying the applicability to and effect of the rule on (a) the minimum distance between buildings; and (b) all applicable dimensional controls; and (2) creating a new procedure for approving a de minimis extension of the nonconforming nature of a structure.

CC: Board of Aldermen
Mayor David B. Cohen
John Lojek, Commissioner of Inspectional Services

RECOMMENDATIONS: SEE "RECOMMENDATIONS" SECTION WITHIN.

The purpose of this memorandum is to provide the Board of Aldermen, Planning and Development Board, and the public with technical information and planning analysis which may be useful in the decision making process of the Boards. The Planning Department's intention is to provide a balanced view of the issues with the information it has at the time of the public hearing. There may be other information presented at or after the public hearing that the Zoning and Planning Committee of the Board of Aldermen will consider in its discussion at a subsequent Working Session.

I. BACKGROUND

The *de minimis* provision was adopted by the Board of Aldermen December 6, 1993 largely to ease the burden on owners seeking minor alterations to legally nonconforming buildings and homes. Prior to the adoption of this provision, state law required that any alteration or extension (no matter how small) of a nonconforming structure required a special permit from the Board of Aldermen with a finding that the extension would not be substantially more detrimental to the neighborhood. Existing Section 30-21(c) serves to pre-qualify a prescribed list of improvements "..to a lawful nonconforming building or structure used for residential purposes" which meet certain conditions and dimensional requirements as "..not substantially more detrimental to the neighborhood pursuant to chapter 40A, section 6 of the General Laws." Section 30-21(c) has streamlined and makes possible the "as-of-right" permitting of modest alterations to nonconforming dwellings without the need to petition the Board of Aldermen for zoning relief.

Over time a number of concerns regarding the intent and outcomes of Section 30-21(c) have been noted. In addition, the Commissioner of Inspectional Services has also identified some aspects needing better definition as well as review. As a result, it was included in the list of items to be addressed by the Zoning and Planning Committee Task Force.

Chaired by Ald. Ted Hess-Mahan, the Task Force convened working subcommittees, which then reported back to the Task Force over time on designated issues. Thereafter, the Task Force transmitted a set of reports to the Zoning and Planning Committee on the various items. The subject petition #111-07 reflects the Task Force report with respect to the "*de minimis*" provision. In addition, the following concurrent Task Force petitions, discussed in companion memoranda prepared by the Planning Department, address certain zoning concerns as follows:

- #108-07 – 50% demolition provision
- #109-07 – Three-foot grade change
- #110-07 – Half story and dormers
- #126-07 – Definitions pertaining to "half story" and "dormer"

This memorandum looks at information and suggestions provided by the Task Force De Minimis Subcommittee (hereafter Subcommittee).
(SEE ATTACHMENT A – SUBCOMMITTEE FINDINGS)

II. CURRENT ORDINANCE

Section 30-21(c) states as follows:

(c)Regardless of whether there are increases in the nonconforming nature of a structure, the board of aldermen deems that the following changes to lawfully nonconforming structures are de minimis and that these changes are not substantially more detrimental to the neighborhood pursuant to chapter 40A, section 6 of the General Laws. The following alterations, enlargements, reconstruction of or extensions to a lawful nonconforming building or structure used for residential purposes may be allowed in accordance with the procedures set forth below; provided that (1) relief is limited to that portion or portions of the building or structure which is presently dimensionally nonconforming, (2) the resulting

changes on the nonconforming side will be no closer than five feet to the side or rear property line, (3) the resulting distance to the nearest residence at the side where the proposed construction will take place is equal to or greater than the sum of the required setbacks of the two adjacent lots, and (4) the resulting construction will meet all building and fire safety codes:

(1) Dormers that do not extend above the height of the existing roof peak and do not add more than four hundred (400) square feet of floor area;

(2) Decks or deck additions or porches less than two hundred (200) square feet in size;

(3) First floor additions in the side and rear setbacks which do not total more than two hundred (200) square feet in size.

(4) Second floor additions which do not total more than four hundred (400) square feet in size;

(5) Enclosing an existing porch of any size;

(6) Bay windows in the side and rear setbacks which are cantilevered and do not have foundations;

(7) Bay windows which protrude no more than three (3) feet into the front setback and are no less than five (5) feet from the alteration to the lot line;

(8) Alterations to the front of the structure if within the existing footprint; and

(9) Alterations and additions to the front of a structure of not more than seventy-five (75) square feet in size, so long as the alteration, addition, reconstruction or extension does not encroach any farther into the front setback.

III. PROPOSED AMENDMENT

Although new language is not proposed at this time, the Subcommittee report suggests a number of revisions. The following were included in the advertisement of the subject petition:

(1) Clarify the building separation provision and address any unintended consequences on abutters' rights; (See 30-21(c), condition (3) in the first paragraph, above.)

(2) Clarify the scope of *de minimis* applicability. That is, determine whether selected density and dimensional controls or all such controls may receive *de minimis* treatment; and

(3) Create a new procedure for approving a de minimis extension of the nonconforming nature of a structure.

In addition, it is noted that the Subcommittee report raised the following concerns:

(1) Revise to limit availability of *de minimis* to legally nonconforming single- and two-family dwellings.

(2) Regulate, but not prohibit, multiple requests for *de minimis* treatment. Consider inserting a waiting period between applications.

(3) Establish a special permit mechanism enabling the Zoning Board of Appeals to review and grant special permits for small (i.e. *de minimis)* exceptions to Table 1 parameters beyond setbacks with respect to a nonconforming residential building. This would necessitate applicable amendments to Section 30-23 and 30-24 pertaining to special permit granting authority.

Should the Zoning and Planning Committee concur with the above suggestions, specific language amending the Zoning Ordinance will need to be prepared for review and consideration by the Board of Aldermen.

IV. ANALYSIS

Building separation condition. As currently written, condition (3) provides that whenever a de minimis intrusion into a side or rear setback is considered, the total distance separating the proposed improvement from the building on the adjacent lot may not be less than the sum of the applicable setbacks of the two involved lots. File records indicate that when this condition was discussed in 1993, concerns were raised regarding the effect upon the corresponding setback of the adjacent property (particularly if a conforming building). Whenever a nonconforming structure is allowed to extend further within a setback so as to come closer to a side (or rear) lot line (but not closer than 5 ft.), the building separation provision has the effect of increasing the side setback on the adjacent property. However, the provision was adopted in 1993 so as to provide a mechanism preventing one structure from being too close to another.

A similar concern on the building separation issue has been raised more recently by the Commissioner of Inspectional Services, both as to its seemingly unintended consequences on abutters, and also as to the difficulty in tracking such changes. ***SEE ATTACHMENT B – UNANTICIPATED CONSEQUENCES (BUILDING SEPARATION),*** provided by the Commissioner. In addition, the Law Department has noted that development rights are not necessarily permanent unless exercised. In the above scenario, had the abutting neighbor decided to build their own addition first, the available building envelope to their side setback would have been preserved, and the application for *de minimis* extension into the side setback by the neighbor with a nonconforming building might not have been possible to the extent desired. However, it is also noted that the Inspectional Services Department has not found this to be a concern appearing with any significant frequency within recent permitting experience.

Scope of *de minimis* provision. Section 30-15, Table 1 – *Density & Dimensional Controls in Residence Districts and For Residential Uses* (Table 1) establishes the density and dimensional controls for residential uses. These parameters have largely been in effect in their current state since 1987. However, it is noted that subsequent to adoption in 1993 of the subject Section 30-21(c), building heights and stories were reduced in 1997, and one new parameter – FAR was also introduced in 1997. (Table 2 – *Dimensional Regulations for Religious and Non-Profit Educational Uses*, and Table 3 – *Dimensional Requirements for Commercial Districts* were initially instituted in 1987.) Section 30-21(c) is available to "a lawful nonconforming building or structure used for residential purposes", which includes a range of residential buildings. Anecdotal building permitting information suggests that *de*

minimis applications seem to occur more typically with 1–3 family dwellings. Given the significant nonconforming housing stock in Newton, the Planning Department does not believe that *de minimis* treatment should be limited to single- and two-family dwellings as suggested by the Subcommittee. However, the Planning Department agrees with the Commissioner of Inspectional Services and the Law Department that *de minimis* is not available to detached accessory buildings such as garages, including when an applicant seeks to build habitable space within such a building. In any event, accessory apartments within detached buildings are separately governed by Section 30-8(d)(2), and 30-9(h)(1) subject to special permit. The Planning Department believes language in the beginning paragraph should remain as is or perhaps be further clarified to ensure that *de minimis* is available to lawful nonconforming buildings used for residential purposes, regardless of zoning district where located.

As currently written, Section 30-21(c) lists nine types of allowed improvements and corresponding limits, provided these also meet the basic four (4) conditions stated in the first paragraph. However, the text is silent on related dimensional controls such as lot coverage, open space, stories, height, and FAR. As a result, the Inspectional Services staff have generally taken the interpretation that a proposed *de minimis* improvement should also meet other applicable Table 1 controls where applicable. An argument can be made that a modest improvement otherwise approvable under *de minimis*, should be permittable as of right even if such extension also has an incidental effect minimally increasing already nonconforming lot coverage or minimally decreasing already nonconforming open space. In such case, it would be necessary to develop suitable thresholds for these types of situations. It is also noted that creation of new nonconformities as to open space or lot coverage is not allowed. Should this occur, an applicant would need to seek a variance from the Zoning Board of Appeals.

Delegation of special permit granting authority. As also noted in the discussion of companion Petition #109-07, in Newton the special permit granting authority is the domain of the Board of Aldermen, unlike many other Massachusetts communities, where such authority is largely exercised by entities such as a Planning Board and/or a Zoning Board of Appeals. The Subcommittee has indicated interest in an approach which would limit the applicability of *de minimis* to setbacks only, while establishing an alternate special permit path utilizing the Zoning Board of Appeals to review and approve any need for adjustment of one or more non-setback controls when triggered by de minimis type alterations to nonconforming residential buildings. This would be consistent with the normal role of the Zoning Board of Appeals and also with the intent of Section 30-21(c) to provide a less costly and less burdensome review and approval process to owners of nonconforming residential buildings. The Planning Department and Commissioner of Inspectional Services believe this concept merits further study, but does not see a need to deal with the concept raised by the Subcommittee as to a procedure to increase the nonconforming "nature" of a use or dwelling. This is already addressed by existing language at the beginning of the first sentence of Section 30-21(c): "Regardless of whether there are increases in the nonconforming nature of a structure..". We also note that the Board of Aldermen currently exercise special permit granting authority with respect to increases in building stories and FAR, which would need to be addressed and coordinated within the above approach. The

Planning Department does not support the alternate idea raised by the Subcommittee to possibly establish an additional administrative site plan review process (similar to review of "Dover" protected uses) for the review of *de minimis* situations discussed above. In any event, as noted above, it would make sense to develop a *de minimis* standard applicable to lot coverage and open space so as to be usable in conjunction with existing types of qualifying *de minimis* improvements without the need for initiating any special permit process in cases with minimal changes in existing lawful nonconforming conditions.

Multiple requests. The Planning Department concurs with the Commissioner of Inspectional Services and the Subcommittee that regulation of multiple *de minimis* requests is needed. At present, an applicant may seek to "piggy back" several requests in sequence, thereby achieving a total increase in nonconformity exceeding the limits established in Section 30-21(c). While the insertion of a mandatory time interval between *de minimis* requests may help, the overall result would still be extension of a nonconforming structure to an extent not otherwise available. On the other hand, with change of ownerships, new needs may arise prompting further adjustment of a nonconforming dwelling to accommodate different family circumstances. Further study of this aspect is needed to arrive at a suitable regulatory mechanism.

Measurement of areas improved pursuant to *de minimis.* At present, Section 30-21(c) typically utilizes terminology such as "..four hundred (400) square feet in size" or "..four hundred (400) square feet of floor area." Neither "size" nor "floor area" are terms currently defined in Section 30-1, *Definitions,* for the purpose of use with *de minimis.* It is suggested that a suitable definition of these terms be developed with assistance of the Law Department, and that such definitions contain a further clarification consistent with current Inspectional Services Department practices that the area to be measured is that area falling within the area of encroachment upon a setback.

V. SUMMARY

Adopted in 1993, the *de minimis* provision has been in operation approximately 14 years. The Planning Department concurs with the Subcommittee that a number of clarifications are needed to update and facilitate the implementation of Section 30-21(c) as a measure to streamline as of right permitting for modest modifications to nonconforming buildings used for residential purposes. Such needed clarifications include: building separation across lot lines, extent of applicability of *de minimis* for use with residential buildings, mechanism to address minimal increases in associated nonconformities, mechanism to regulate repeat requests, and size/area definitions for use with *de minimis.* The Planning Department believes further study is needed to ascertain whether a special permit path utilizing the Zoning Board of Appeals should be considered to address situations where qualifying *de minimis* improvements also trigger the need for minor adjustment of other Table 1 dimensional parameters.

RECOMMENDATIONS:

- ***Further study of condition (3) pertaining to cross-lot line building separation.***
- ***Decline suggestion to limit de minimis to single- and two-family dwellings. Consider revising language in first paragraph of Section 30-21(c) to clarify that de minimis is***

available to all lawfully nonconforming buildings used for residential purposes regardless of district where located.

- ***Develop language such that a modest improvement otherwise approvable under de minimis would be permittable as of right if such extension also has an incidental effect minimally increasing already nonconforming lot coverage or minimally decreasing already nonconforming open space. Develop suitable limits to regulate such effects.***
- ***Develop mechanism to regulate repeat de minimis requests.***
- ***Develop definitions of "size" and "floor area" for use specifically with de minimis and add to Section 30-1, Definitions. Clarify measurement of affected area such that the area to be measured is that area falling within the area of encroachment upon a setback.***
- ***Study potential mechanism utilizing Zoning Board of Appeals as special permit granting authority in cases where minimal adjustments to dimensional controls may be justified in connection with otherwise qualifying de minimis improvements.***

ATTACHMENTS

ATTACHMENT A: *SUBCOMMITTEE FINDINGS.*
Memorandum from G. Michael Peirce to Alderman Ted Hess-Mahan

ATTACHMENT B *UNANTICIPATED CONSEQUENCES (BUILDING SEPARATION)*
Sketch Plan provided by Commissioner of Inspectional Services

ATTACHMENT A

Memorandum to Alderman Ted Hess-Mahan
From G. Michael Peirce, Chairman, De Minimis Subcommittee
Re: Findings

Alderman Hess-Mahan:

I am writing to summarize the status of the discussions and/or deliberations which have taken place in connection with our review of the de minimis ordinance, (Section 30-21 (c)). This ordinance, which was adopted in 1993, basically allows for certain defined expansions of legally nonconforming residential structures which, by definition, **do** increase the nonconforming nature of those structures, to occur, if certain requirements and prerequisites are met, solely upon the issuance of a building permit. Under state law and our local zoning ordinance, except for alterations or expansions of nonconforming single or two-family houses which **do not** increase the nature of the nonconformity, any and all other legal nonconforming structures or uses, whether residential or nonresidential, must be subjected to a review process which is commonly known as a 'Section 6 Finding' special permit. This comes from its location in general laws Chapter 40A, Section 6. The standard is that the change, alteration, expansion or extension not be "substantially more detrimental" to the neighborhood than the existing nonconformity.

The present provision reads as follows:

"(c) Regardless of whether there are increases in the nonconforming nature of a structure, the board of aldermen deems that the following changes to lawfully nonconforming structures are *de minimis* and that these changes are not substantially more detrimental to the neighborhood pursuant to chapter 40A, section 6 of the General Laws. The following alterations, enlargements, reconstruction of or extensions to a lawful nonconforming building or structure used for residential purposes may be allowed in accordance with the procedures set forth below; provided that (1) relief is limited to that portion or portions of the building or structure which is presently dimensionally nonconforming, (2) the resulting changes on the nonconforming side will be no closer than five feet to the side or rear property line, (3) the resulting distance to the nearest residence at the side where the proposed construction will take place is equal to or greater than the sum of the required setbacks of the two adjacent lots, and (4) the resulting construction will meet all building and fire safety codes:
(1) Dormers that do not extend above the height of the existing roof peak and do not add more than four hundred (400) square feet of floor area;
(2) Decks or deck additions or porches less than two hundred (200) square feet in size;
(3) First floor additions in the side and rear setbacks which do not total more than two hundred (200) square feet in size;
(4) Second floor additions which do not total more than four hundred (400) square feet in size;
(5) Enclosing an existing porch of any size;
(6) Bay windows in the side and rear setbacks which are cantilevered and do not have foundations;
(7) Bay windows which protrude no more than three (3) feet into the front setback and are no less than five (5) feet from the alteration to the lot line;
(8) Alterations to the front of the structure if within the existing footprint; and

(9) Alterations and additions to the front of a structure of not more than seventy-five (75) square feet in size, so long as the alteration, addition, reconstruction or extension does not encroach any farther into the front setback."

The committee evaluated the ordinance on a number of grounds. Commissioner Lojek was interested in input as to:

(1) whether the ordinance was or should be limited solely to single and two-family houses,

(2) whether the ordinance was or should be limited to set back requirements, (excluding, for example, lot coverage or open space) and

(3) whether there is a reason to limit its employment to a single project and/or if once employed it might be used for another expansion of that particular expansion (for example, after expansion in a side yard setback on the first floor might a subsequent application be made to build an addition over that now additionally nonconforming first floor).

As is included below, we sought out the experience and counsel of Juris Alksnitis:

De Minimis Subcommittee, Zoning Task Force

Barbara Huggins for the Subcommittee
Notes from conversation with Juris Alksnitis, June 14, 2006

Process

Juris explained the process by which de minimis findings occur ("findings" is my word, not his). An applicant comes to ISD for a building permit for alterations to an existing nonconforming structure. The proposed changes are asserted by the applicant as to satisfy the provisions of the de minimis ordinance. An inspector makes the determination as to whether the changes do in fact satisfy the provisions of the ordinance, including the determination that the changes are "not substantially more detrimental to the neighborhood." Sometimes this determination is made in consultation with the legal department and/or with Juris. Sometimes a determination is made that there should be a type of planning review of the application. In such cases, the possible outcomes are 1) the applicant redesigns so that the structure doesn't encroach into the setbacks (eliminating the need for a de minimis finding); 2) a finding is made that the proposed changes satisfy the de minimis provisions; or 3) a finding is made that the proposed changes do not satisfy such provisions.

Records

Juris advised that there is no record kept of how many applications for de minimis findings are made, or of how many of these are allowed. The building permit is simply issued with no special notation. He advised that the Commissioner might be able to give us some estimates and more information. His sense is that the most frequent usage of de minimis is for 1st and 2nd floor additions, and alterations to the front of structures (subsections 3, 4, 8, and 9 of 30-21(c).

Interpretation and Revision

We discussed some of the questions raised by our subcommittee, including whether the de minimis provisions were intended to apply only to (or should be applied only to) single and two-family houses. Juris suggested researching the meeting minutes from the time of the section's adoption for information on this question. He suggested that clarification would be helpful to expand the reach of de minimis to 3-family and multi-family structures.

Juris noted that that he, the Commissioner and the legal department agree that the de minimis provision may not be used with respect to detached garages. This arises when an applicant wishes to build habitable space above a detached garage. The reasoning is that the de minimis rule is meant to apply to the primary use of a residential structure, and not to accessory uses or structures. Juris suggested that the ordinance could be clarified to reflect this policy.

Juris further suggested clarification of the ordinance to provide that, with respect to additions referenced in subsections 2, 3 and 4, only the area of the nonconforming portion of the addition is counted toward the 200 square foot limit, as opposed to the total area of the addition. Such clarification would be consistent with current policy.

As for the question of whether the de minimis provision applies to, or should apply to lot coverage or open space, Juris advised that he would need to give that question more thought. He noted that the city had lot coverage and open space requirements prior to setback requirements.

As for other possible revisions to the ordinance, Juris suggested that an updated list of small modifications permitted might be useful. He noted that the list of modifications in the ordinance (subsections 1-9) represent those modifications that applicants commonly made at the time the ordinance was passed; there may be new categories of alterations occurring out there in the field that should be reflected in a new list. He suggested that the Commissioner would have a sense of what these might be.

Recommendations:

We were of the unanimous opinion that the ordinance should be amended to clearly limit it to single and two-family houses which are legally nonconforming. Since the greatest protection is afforded those uses by the Ch. 40A and Section 30-21 generally, it was the feeling of the subcommittee that this ability to build in a way that is by definition more nonconforming should be limited to those specially protected uses.

We were of a split opinion that the provision should be interpreted (or amended) ordinance to allow for its employment in any case of dimensional nonconformity (lot coverage, open space, height) where the increase at least fits the square foot or other parameters presently contained therein. For example it is the position of some that there would be no reason not to allow an additional side yard incursion meeting the square foot requirement which also might

increase the legally nonconforming lot coverage by whatever percentage that small addition might create.

Others on the subcommittee are of the strong opinion that since review of the report issued when the ordinance was adopted provides no suggestion that any other dimensional control besides setbacks was designated for relief that its use should be expressly limited to setback relief. In fairness this may be a majority view, although it may be evident from this report that careful vote tabulations were not always taken and preserved (another clear failure by the chairman).

The subcommittee was also split as to whether more than one request for relief, regardless of whether limited to setbacks or not, should be able to be made on any one occasion. Additionally, a difference of opinion exists as to whether the same home owner or a subsequent owner might pyramid on a prior de minimis application. One method to address that which a majority of the subcommittee agreed upon could be to add a waiting period, and thus employ language analogous to that found in the accessory apartment ordinance where, there, additions which would allow a particular home to qualify for an accessory apartment cannot be counted as an appropriate increase in square footage until they have been in existence for at least, in that case, four (4) years.

Finally, given that certain members strongly support limiting the reach of the ordinance to setback relief, as possible alternative to subjecting other types of arguably de minimis changes there was some degree of support for a modified review process for any de minimis style relief for any other increase in nonconformity beyond the setback nonconformity relief. The options discussed were: either an in-house administrative site plan approval process, such as with 'Dover' protected uses, **or** zoning board of appeals review, acting as special permit granting authority. This was under the theory that since the initial analysis under 40A and our present section 30-21 is to a degree deliberative, namely as to whether any particular increase in a non-conforming use or structure increases the "nature" of that use or structure's nonconformity, that any increase should require some form of deliberative review. In other words, we agreed that there ought to be a process for these minor modifications which would not subject homeowners to the extensive, time consuming, and expensive board of alderman process.

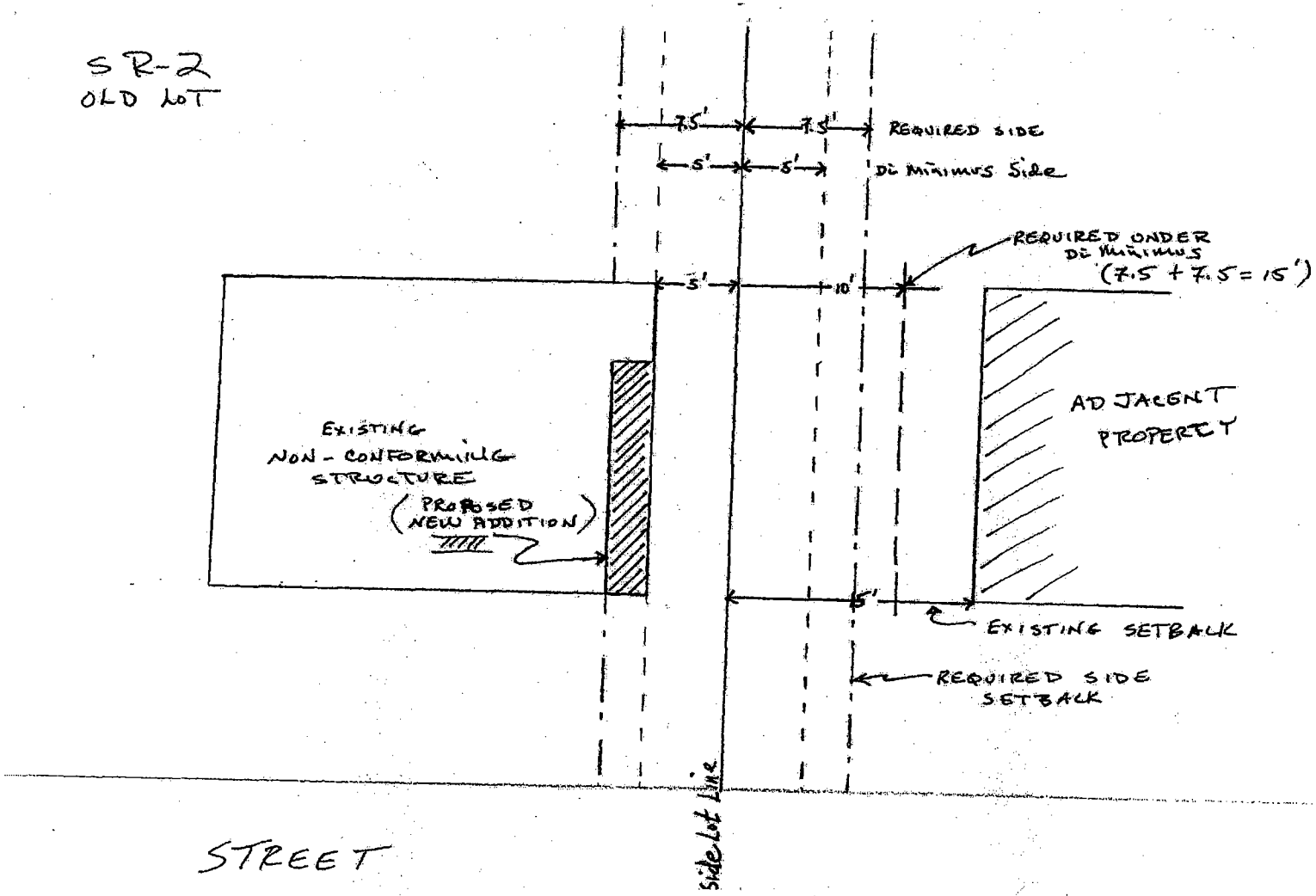
While there was a split among the members the was a general agreement that the ZBA was an appropriate forum for this type of consideration because the essence of a de minimis determination is somewhat akin to a variance, in that a new non-conformity is being created and without the provision a variance would in fact be the method for such relief.

Other members of the subcommittee were of the opinion that de minimis is particularly appropriate for some form of special and liberal treatment. Unlike certain other aspects of the zoning ordinance which may lend themselves more to development interests, they are of the opinion that de minimis would more likely be employed by Newton homeowners seeking to upgrade the quality of their (often comparatively 'affordable') existing homes, often to match life changes, whether be increases in the number of children or elderly family members moving

in. As do the passage of any set of laws, zoning enactments present a balancing of potentially competing interests. Fourteen (14) years ago the Board of Aldermen determined after study, legal input and debate, that on balance homeowners who wished to make minor modifications in their houses should have the right to make such changes without having to have those modifications tested by an overall neighborhood assessment, presumably under the theory that such minor modifications would not be "substantially" more detrimental to the neighborhood than the prior non-conformity.

There is a minority opinion on the subcommittee that all applications implicating the de minimis rule – that is, including those involving increased setback nonconformity - be subject to the deliberative review suggested above. The subcommittee member holding this view believes: that the character of a neighborhood – particularly a neighborhood of small lots - may change significantly over time, when the aggregate impact of changes labeled "de minimis" are considered and that while it is true that de minimis is largely employed by homeowners seeking "upgrades," the City has a responsibility to consider the long-term, collective impact of such changes, for the purpose of preserving neighborhood character.

Unanticipated consequences



ATTACHMENT B